IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 21 OF 2005

Shri Ravikant C. Borkar
Major in age, r/o. H. No.24/B,
Kirbhat, Nuvem,
Salcete-Goa. ... Appellant

versus

1. Shri Gokuldas Ramchandra Naik,
   Major in age, r/o. H. No.686,
   Murida, Fatorda, Salcete-Goa.

2. State of Goa
   through Public Prosecutor,
   High Court of Bombay at Panaji. ... Respondents

Mr. A. Borkar, Advocate for the Appellant.

Ms. Asha Dessai, Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 27TH JULY, 2007.

ORAL JUDGMENT

This is Complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, by Order dated 31-3-2005 of the learned C.J.M., Margao.

2. The case of the Complainant was that by an agreement-cum-receipt dated 23-2-2001 the accused along with his wife had agreed to sell a flat of the building situated at Murida in Chalta No.18 of P.T. Sheet No. 78 of City Survey of Margao Town for a price of Rs.3,00,000/- and pursuant to the said agreement the Complainant had paid a sum of Rs.50,000/- on 22-3-2001 as earnest money. The Complainant produced the said receipt at Exh.C-16.

3. It was also the case of the Complainant that the accused expressed his inability to transfer the said flat in the name of the Complainant and therefore agreed to return the earnest money with interest which the Complainant did by issuing a cheque dated 25-8-2001 for Rs.58,750/- which when presented for payment was returned dishonoured for insufficiency of funds by the Bank's advice dated 28-8-2001 and after the accused was informed by the Complainant that he had no alternative but to file a case, the accused took the said cheque back and issued two cheques in the sum of Rs.25,000/- each drawn on Goa State Co-Operative Bank Limited. This case pertains to cheque No.477940 dated 16-7-2003. It is stated that the case pertaining to cheque No.477939 dated 16-6-2002 is still pending.

4. Further, the case of the Complainant was that he had deposited the subject cheque but it was returned dishonoured for insufficiency of funds, by intimation dated 27-1-2003 and therefore the Complainant contacted the accused who requested him to present the cheque again and accordingly it was

presented only to be again returned dishonoured for insufficiency of funds, vide intimation dated 2-9-2003 whereupon the Complainant sent a legal notice dated 15-9-2003 which was received by the accused but the accused failed to comply the same. Admittedly, the accused did not send any reply to the said notice but it is the case of the accused that the said two cheques were taken from him forcibly at the Police Station.

5. The learned C.J.M. has proceeded to acquit the accused because according to the learned C.J.M., the cheque dated 25-8-2001 for Rs.58,750/- began with No.48 and other odd numbers and the subject cheque began with No.477940. The learned Counsel on behalf of both the parties concede that the No.48 is not reflected either in the complaint or the evidence of the Complainant and in fact the learned Counsel submit that it is not known how the learned C.J.M. got the said No.48. As per the learned Counsel of the Complainant, the said cheque dated 25-8-2001 for Rs.58,750/- was returned by the Complainant to the accused and therefore the Complainant could not have had the same nor known its number. Likewise, the learned Counsel concede that they do not know as to how the learned C.J.M. came to the conclusion that the Complainant and the accused are relatives since there is nothing in that regard in the complaint or the evidence of the Complainant. It is therefore obvious that the Judgment proceeds totally on extraneous considerations. Unless there was cross-examination that the first cheque dated 25-8-2001 was having a number which was later to the number of the cheques

of Rs.25,000/- each, the learned C.J.M. could not have based his conclusion that the former cheque was issued later at any point of time than the two cheques in question of Rs.25,000/- each.

6. Be that as it may, the learned Counsel on behalf of the Complainant submits that the learned C.J.M. has not at all considered the effect of presumption which was available to the Complainant in terms of Section 139 of the Act. The learned Counsel on behalf of the Complainant further submits that the Complainant had produced the agreement-cum-receipt dated 22-3-2001 to support the initial transaction between the Complainant and the accused. The learned Counsel further submits that the Complainant also had two cheques issued by the accused and duly signed by him and therefore there was also a suggestion in the cross-examination of the Complainant, put by the accused to the effect that the Complainant had told the accused that as he did not want the flat, the Complainant wanted his money back, which suggestion showed that the accused owed money to the Complainant.

7. On the other hand, the learned Counsel on behalf of the accused submits that the case of the accused has always been that the said two cheques for Rs.25,000/- each were obtained by the Complainant forcibly at the Police Station. However, the learned Counsel concedes that the accused did not reply to the notice sent by the Complainant nor examined himself in support of the

plea taken that the said cheques were taken forcibly from the accused.

8. The Complainant in his cross-examination admitted that after the cheque had bounced he had approached the Police and the reference to that cheque could only be to the cheque dated 25-8-2001 for Rs.58,750/-. The Complainant also admitted that after about six months of the bouncing of the said cheque issued by the accused he had been to the Police Station where he met Dy. S. P. Shri Gaonkar who referred him to some Head Constable whose name he did not know. The Complainant clearly denied the suggestion that at the Police Station the signatures of the accused were taken forcibly on the said two cheques. Admittedly, both the cheques for Rs.25,000/- each were issued after over a year the accused had gone to the Police Station but one need not immediately jump to the conclusion that because the Complainant had been to the Police Station that the cheques of Rs.25,000/- were taken from the accused forcibly. No doubt the accused took this plea in his cross-examination as well as in his statement under Section 313 of the Code but failed to translate that plea into acceptable evidence by leading any evidence whatsoever including his own.

9. There is no dispute that the Act has created several presumptions in favour of the Complainant in a prosecution under Section 138 of the Act. The first is under Section 118 itself and the next are under Sections 138 and 139 of the Act. As regards the said presumptions, the Apex Court, speaking

through three learned Judges, in **Hiten P. Dalal** v. **Bratindranath Banerjee**((2002) 6 SCC 16) and referring to Sections 138 and 139 of the Act has stated that it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. The obligation on the prosecution may be discharged with the help of presumptions of law of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. The Apex Court also stated that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exists or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man. The learned C.J.M. did not at all consider the effect of the aforesaid presumptions available to the accused in terms of the said Sections of the Act, referred to hereinabove. As already stated the accused did not at all translate the plea taken by him, by way of evidence to the effect that the two cheques of Rs.25,000/- each were taken from him, forcibly. There was not even a suggestion that there was any occasion for the Complainant and the accused to be called to the Police Station at one time where the accused was compelled to sign the said two cheques forcibly. The plea taken by the accused was nothing but an excuse to avoid his liability to pay the amount due to the Complainant on the said two cheques. The accused had clearly failed to discharge the onus

which was upon him, that the cheques were taken forcibly.

10. Consequently, the appeal succeeds. The impugned Order dated 31-3-2005 of the learned C.J.M. is hereby set aside and the accused convicted under Section 138 of the Negotiable Instrument Act, 1881.

11. The learned Counsel on behalf of the Complainant has brought to my notice the Judgment of the Apex Court in **Suganthi Suresh Kumar** v. **Jagdeeshan**((2002) 2 SCC 420) and has submitted that the sentence ought not to be a flea bite. Nevertheless, the learned Counsel on behalf of the Complainant states that in case the accused pays to the Complainant compensation of Rs.45,000/-, the Complainant would be satisfied and would not press for any further sentence. Learned Counsel on behalf of the accused agrees. Considering the aforesaid submission, the accused is hereby directed to pay to the Complainant compensation of Rs.45,000/- under Section 138 of the Act within a period of three months. Upon failure to pay the said compensation the accused shall undergo S.I. for four months.

N. A. BRITTO, J.

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